(13)

No. 02-1809

Supreme Court, U.S.
FILED
DEC 19 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

J. ELLIOTT HIBBS,
in his official capacity as Director of the
Arizona Department of Revenue,
Petitioner,
v.
KATHLEEN M. WINN,
Arizona taxpayer, et al.,
Respondents.

On Writ of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

AYESHA N. KHAN*
**Counsel of Record*
Americans United for Separation
of Church and State
518 C Street, NE
Washington, D.C. 20002
(202) 466-3234

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
People For the American Way
Foundation
2000 M Street, NW, Suite 400
Washington, D.C. 20036
(202) 467-4999

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Finding the TIA to Bar Cases Such as This One Would Mark a Radical Departure from Longstanding Jurisprudence and Would Dramatically Undercut Civil Rights Protections 5

A. This Court and the Lower Federal Courts Have Consistently Understood the TIA Not to Bar Federal Court Challenges of the Kind at Issue Here 5

B. The Interpretation of the TIA Advanced by Petitioner Would Dramatically Weaken Establishment Clause Protections 9

1. Disbursements of Public Funds Frequently Implicate Establishment Clause Concerns 10

2. Barring Federal Court Review Would Frustrate the Purposes of Section 1983 12

3. The Potential for Supreme Court Review Is Not an Adequate Substitute for Lower Federal Court Review .. 15

II. The Respondents Do Not Seek a "Second Bite at the Apple" 16

A. The Claims in *Kotterman* 17

B. The Claims in the Present Litigation 18

C. The "Second Bite at the Apple" Argument Is a Red Herring 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 521 U.S. 203 (1997) 10

Aguilar v. Felton, 473 U.S. 402 (1985) 10

Allen v. McCurry, 449 U.S. 90 (1980) 12

American Civil Liberties Union Found. of Louisiana v. Bridges, 334 F.3d 416 (5th Cir. 2003) 9, 11

Appling County v. Municipal Elec. Auth. of Georgia, 621 F.2d 1301 (11th Cir.), *cert. denied*, 449 U.S. 1015 (1980) 8

Ascension Lutheran Church v. Employment Sec. Comm'n of North Carolina, 501 F. Supp. 843 (D.N.C. 1980) 9

Bd. of Educ. of Central Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968) 10

Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) 7

Bowen v. Kendrick, 487 U.S. 589 (1988) 10

Braxton v. United States, 500 U.S. 344 (1991) 15

Byrne v. Pub. Funds for Pub. Schs. of New Jersey, 442 U.S. 907 (1979) 6

Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 5, 6, 10, 11

Comm. for Pub. Educ. & Religious Liberty v. Nyquist,
350 F. Supp. 655 (S.D.N.Y. 1972),
aff'd in part, 413 U.S. 756 (1973) 6

Everson v. Bd. of Educ.,
330 U.S. 1 (1947) 10

Fair Assessment in Real Estate Ass'n v. McNary,
454 U.S. 100 (1981) 7

Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990) 8, 11

Franchise Tax Bd. of California v. United Ams. for Pub. Schs.,
419 U.S. 890 (1974) 6

Glassroth v. Moore, 335 F.3d 1282 (11th Cir.),
cert. denied, 124 S. Ct. 497 (2003) 13, 14

Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002),
aff'd, 335 F.3d 1282 (11th Cir.), *cert. denied*,
124 S. Ct. 497 (2003) 14, 15

Griffin v. County Sch. Bd. of Prince Edward County,
377 U.S. 218 (1964) 5

Griffin v. Bd. of Superiors of Prince Edward County,
322 F.2d 332 (4th Cir. 1963),
rev'd, 377 U.S. 218 (1964) 6

Grit v. Wolman, 413 U.S. 901 (1973) 6

Hunt v. McNair, 413 U.S. 734 (1973) 10

Johnson v. De Grandy, 512 U.S. 997 (1994) 19

Kosydar v. Wolman, 353 F. Supp. 744 (D. Ohio 1972), *aff'd sub nom. Grit v. Wolman*, 413 U.S. 901 (1973) 6

Kotterman v. Killian, 972 P.2d 606 (Ariz.), *cert. denied*,
528 U.S. 921 (1999) ..... *passim*

Lee v. Weisman, 505 U.S. 577 (1992) 10

Lemon v. Kurtzman, 403 U.S. 602 (1971) 10

Levitt v. Comm. for Pub. Educ. & Religious Liberty,
413 U.S. 472 (1973) 10

Luthens v. Bair, 788 F. Supp. 1032 (S.D. Iowa 1992) 8

Matsushita Elec. Indus. Co. v. Epstein,
516 U.S. 367 (1996) 19

Meek v. Pittenger, 421 U.S. 349 (1975) 10

Minnesota Civil Liberties Union v. Roemer,
452 F. Supp. 1316 (D. Minn. 1978) 8

Mitchell v. Helms, 530 U.S. 793 (2000) 10

Mitchum v. Foster, 407 U.S. 225 (1972) 12, 13

Monroe v. Pape, 365 U.S. 167 (1961) 12

Moton v. Lambert, 508 F. Supp. 367 (N.D. Miss. 1981) ... 8

Mueller v. Allen, 463 U.S. 388 (1983) ..... *passim*

Mueller v. Allen, 514 F. Supp. 998 (D. Minn. 1981),
aff'd, 676 F.2d 1195 (8th Cir. 1982),

aff'd, 463 U.S. 388 (1983) 6

New Hampshire v. Maine, 532 U.S. 742 (2001) 19

Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002), *cert. granted sub nom., Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 384 (2003) 13

Pub. Funds for Pub. Schs. of New Jersey v. Byrne, 444 F. Supp. 1228 (D.N.J. 1978), *aff'd*, 590 F.2d 514 (3d Cir.), *aff'd*, 442 U.S. 907 (1979) 6

Randolph v. Groscost, 989 P.2d 751 (Ariz. 1999) 18

Rhode Island Fed. of Teachers, AFL-CIO v. Norberg, 479 F. Supp. 1364 (D.R.I. 1979), *aff'd*, 630 F.2d 855 (1st Cir. 1980) 8

Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736 (1976) 10

Rojas v. Fitch, 928 F. Supp. 155 (D.R.I. 1996), *aff'd*, 127 F.3d 184 (1st Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). 8

Rosenburger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) 10

Sch. Dist. of City of Grand Rapids v. Ball, 473 U.S. 373 (1985) 10

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 3

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) ... 10, 11

Tilton v. Richardson, 403 U.S. 672 (1971) 10

United States v. L. A. Trucker Lines, Inc., 344 U.S. 33 (1952) 7

Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970) 10, 11

Winn v. Killian, 307 F.3d 1011 (9th Cir. 2002) 16, 18

Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) 10

Wolman v. Walker, 433 U.S. 229 (1977) 10

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 10, 19

Statutes

28 U.S.C. § 1341 3

28 U.S.C. § 1738 19

42 U.S.C. § 1983 12

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 11

ARIZ. REV. STAT. ANN. § 43-1089 16

FLA STAT. ANN. § 220.187 12

IOWA CODE ANN. § 422.12(2) 12

MINN. STAT. § 290.0674 12

PA. STAT. ANN. Tit. 24, §§ 20-2001-B *et seq.* 12

35 ILL. COMP. STAT. ANN. 5/201(m) 13

Other Authorities

Exec. Order 13199, 66 Fed. Reg. 8499 (Jan. 31, 2001), *reprinted in* 5 U.S.C. § 601 ..... 11, 12

CONG. GLOBE, 42nd Cong., 1st Sess. 459 (1871) 13

SUP. CT. R. 10 15

The Supreme Court of the United States, *The Justices' Caseload*, *available at* http://www.supremecourtus.gov/about/justicecaseload.pdf. 15

Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) .. 13

Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003) 12

Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) 13

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a national public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state.

People For the American Way Foundation is a nonpartisan, education-oriented citizens organization established to promote and protect civil and constitutional rights. It was founded by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty.

Each of the *amici* organizations has appeared before this Court on numerous occasions, both as counsel and amicus curiae. Both frequently litigate Establishment Clause challenges to the public financing of religious institutions. Because this case will determine where these constitutional questions will be resolved, its resolution is of significant concern to the *amici*.

STATEMENT OF THE CASE

At issue in this case is an Arizona statute that uses state income tax credits to provide funding for primary and secondary school education. Under the Arizona statute, individual taxpayers may reduce their state tax liability by

---

[1] Letters of consent to the filing of this brief are on file with the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

making a donation to a school tuition organization (hereinafter "STO"). Taxpayers who make such payments receive a dollar-for-dollar credit against their tax liability, up to a certain fixed amount. The STOs, in turn, are required to use these public funds to provide scholarships for students attending private schools, including religious schools. STO funds cannot be used for public schools. STOs can distribute the funds without regard to the financial need of students and without consideration of the quality of the public school the student would otherwise attend. *See generally* J.A. at 8-14 (Compl. at ¶¶ 4-28).

Before the statute went into effect, it was challenged on its face by persons not party to this case. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999).[2] Although the Arizona Supreme Court rejected the facial challenge (by a 3-2 vote), the court recognized that the actual implementation of the program could present constitutional problems, leaving open the door for an as-applied challenge. *Id.* at 615-16.

By the time the complaint in this case was filed, approximately thirty-five STOs had been established. Virtually all of them were established by religious organizations and gave scholarships exclusively to students of their denominations for attendance at exclusively religious schools. J.A. at 9-12 (Compl. at ¶¶ 15-21). Such religiously exclusive STOs controlled ninety-four percent of the funds, leaving those parents interested in sending their children to secular schools with few if any such schools to choose from and few if any

[2] The *amici* organizations were co-counsel to the plaintiffs in *Kotterman*.

STOs to serve them. J.A. at 13 (Compl. at ¶¶ 25-26).[3]

Respondents filed suit in the United States District Court for the District of Arizona, arguing that the Arizona program violates the Establishment Clause and seeking declaratory and injunctive relief. J.A. at 7-16. Petitioner moved to dismiss on the basis of the federal Tax Injunction Act (hereinafter "TIA"), 28 U.S.C. § 1341, and Eleventh Amendment immunity. J.A. at 17. The district court granted the motion on the basis of the TIA, holding that the Act barred the instant case because the suit was an action to restrain the assessment of state taxes. Alternatively, the district court held that principles of comity independently barred the suit. Pet. App. 27-36.

The Ninth Circuit reversed without dissent. Pet. App. 11-26. It held that the district court's conception of the TIA was indefensible in light of the statute's text, purpose, and implementing caselaw. Pet. App. 16. The Ninth Circuit also rejected the district court's alternative holding, finding that principles of comity were inapposite in a case such as this one, where declaratory and injunctive relief pose no identifiable harm to the state government's taxing scheme.

Petitioner did not file a petition for rehearing or rehearing en banc. The Ninth Circuit, on a motion of one of its judges, requested that the parties brief the issue of whether en banc review should be granted. The Ninth Circuit ultimately voted against reconsideration, Pet. App. 1, with two judges dissenting, Pet. App. 2-10.

[3] All of these facts must be taken as true, given that this case is before the Court on a motion to dismiss. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

SUMMARY OF ARGUMENT

Petitioner argues that the TIA and associated principles of comity "preclude federal court interference with the administration of all phases of a State's tax system." Pet. Br. at 3. This construction is not only inconsistent with the text and history of the TIA, as explained in the respondents' brief and the Ninth Circuit's opinion, but it also would mark a radical departure from the Court's Establishment Clause jurisprudence to date and gravely weaken civil rights protections.

Petitioner and its *amici* also suggest that a consideration counseling against jurisdiction is that the plaintiffs here are seeking a second "bite at the apple." This accusation, however, is unfounded, as the issues raised in this as-applied challenge are distinct from those raised in the facial challenge litigated in *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999). But even if the petitioner's allegations of duplicative litigation were true, that would hardly be a justification for expanding the TIA, for the TIA does not prevent relitigation specifically – it prevents litigation altogether. Existing preclusion doctrines are more than sufficient to protect the finality of state court judgments.

ARGUMENT

I. Finding the TIA to Bar Cases Such as This One Would Mark a Radical Departure from Longstanding Jurisprudence and Would Dramatically Undercut Civil Rights Protections

Under the broad reading of the TIA advanced by the petitioner and by Judge Kleinfeld in his opinion dissenting from the denial of rehearing en banc, federal courts are barred from considering "all aspects of state tax administration." Pet. Br. at 20. Two principles ineluctably follow from such a position. The first is that this Court and the courts below it have repeatedly decided cases over which they lacked jurisdiction. The second is that many cases brought under the Establishment Clause and other constitutional provisions will, in the future, be handled by state courts subject to review only by this Court. Both of these principles counsel against the construction of the TIA advanced by the petitioner.

A. This Court and the Lower Federal Courts Have Consistently Understood the TIA Not to Bar Federal Court Challenges of the Kind at Issue Here

Under the petitioner's expansive conception of the TIA, many of this Court's cases should not have proceeded to review; they should have been dismissed for lack of jurisdiction by this Court and by the federal courts below. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), *Mueller v. Allen*, 463 U.S. 388 (1983), and *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) – like the present case – were challenges to state-tax regimes. In all three of these cases, the Court issued a lengthy opinion on the merits of the case. *Nyquist* struck down, on

Establishment Clause grounds, a New York income tax credit aimed at alleviating the cost of private school expenses; *Mueller* upheld against Establishment Clause attack a more limited Minnesota tax credit targeted specifically at certain private school expenses; and *Griffin* affirmed a federal district court's injunction against a county's allowance of tax credits for taxpayer contributions to racially segregated private schools. Moreover, in three other cases, *Byrne v. Public Funds for Public Schools of New Jersey*, 442 U.S. 907 (1979), *Franchise Tax Board of California v. United Americans for Public Schools*, 419 U.S. 890 (1974), and *Grit v. Wolman*, 413 U.S. 901 (1973), this Court summarily affirmed federal court judgments striking down, on Establishment Clause grounds, state tax deductions or credits given to parents whose children attended private schools.

All six of these cases came to the Court through the federal system. *Nyquist*, *Franchise Tax Board*, and *Grit* came directly to the Court from a federal district court (*see Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 350 F. Supp. 655 (S.D.N.Y. 1972), *aff'd in part*, 413 U.S. 756 (1973); *Franchise Tax Bd.*, 419 U.S. at 890; *Kosydar v. Wolman*, 353 F. Supp. 744 (D. Ohio 1972), *aff'd sub nom. Grit v. Wolman*, 413 U.S. 901 (1973)), while *Mueller*, *Griffin*, and *Byrne* came to the Court through the usual federal trial and appellate court process. *See Mueller v. Allen*, 514 F. Supp. 998 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 463 U.S. 388 (1983); *Griffin v. Bd. of Superiors of Prince Edward County*, 322 F.2d 332 (4th Cir. 1963), *rev'd*, 377 U.S. 218 (1964); *Pub. Funds for Pub. Schs. of New Jersey v. Byrne*, 444 F. Supp. 1228 (D.N.J. 1978), *aff'd*, 590 F.2d 514 (3d Cir.), *aff'd*, 442 U.S. 907 (1979). The requested relief in all six of these cases would have been an injunction eliminating the tax deduction or credit, thereby increasing state tax revenues. For the petitioner here – who argues that the TIA applies not only to actions that would

decrease state revenues, but also to actions that would increase them – the exercise of jurisdiction in these cases was manifestly improper.

To be sure, these six decisions – even considered in the aggregate – are not binding precedent on the breadth of the TIA, as it is well established that the Court "is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio." *United States v. L. A. Trucker Lines, Inc.*, 344 U.S. 33, 38 (1952). Nevertheless, given the obligation of every federal court to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (quotation omitted), and the concomitant duty, when jurisdiction is lacking below, to accept jurisdiction "not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit," *id.* (quotation omitted), it is clear that the conception of the TIA advanced by the petitioner necessarily implies that the Supreme Court overstepped by deciding the merits of all of these cases. This alleged error is particularly inexplicable with respect to *Mueller*, which was written by then-Justice Rehnquist who, less than two years earlier, had written the Court's opinion in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), a case specifically addressing the breadth of the TIA and its associated principles of comity.

The lower federal courts have been as consistent as the Supreme Court in allowing constitutional challenges to tax credits and deductions to proceed, the TIA notwithstanding. None of the lower courts in the six decisions described above applied or even discussed the TIA. Other courts have done the same, refusing to apply the TIA as a bar to challenges to state taxing regimes that would not lead to a decrease in tax revenues:

- *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990) (holding a North Carolina statute exempting Bibles from retail sales and use tax to be unconstitutional).

- *Rhode Island Fed. of Teachers, AFL-CIO v. Norberg*, 479 F. Supp. 1364 (D.R.I. 1979) (holding unconstitutional a Rhode Island income tax deduction for tuition, textbook and transportation expenses related to private school education), *aff'd*, 630 F.2d 855 (1st Cir. 1980).

- *Luthens v. Bair*, 788 F. Supp. 1032 (S.D. Iowa 1992) (upholding tax credits and deductions for private school tuition and purchase of text books)

- *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978) (upholding a Minnesota statute giving an income tax deduction for parents of students attending public and private schools).

- *Rojas v. Fitch*, 928 F. Supp. 155 (D.R.I. 1996) (holding that the TIA was inapplicable to a claim that the exemptions for religious employers under the Rhode Island unemployment tax statute and Federal Unemployment Tax Act violated the Establishment Clause), *aff'd*, 127 F.3d 184 (1st Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

- *Appling County v. Municipal Elec. Auth. of Georgia*, 621 F.2d 1301 (11th Cir.) (dismissing, on grounds unrelated to the TIA, an action challenging a Georgia ad valorem tax exemption given to owners of a power plant), *cert. denied*, 449 U.S. 1015 (1980).

- *Moton v. Lambert*, 508 F. Supp. 367 (N.D. Miss. 1981)

(involving a challenge to Mississippi statutes that exempted racially segregated schools from certain taxes).[4]

Only a single case (not including the district court in the instant case) has ever found the TIA to bar an Establishment Clause challenge that would result in an increase to state revenues. *See American Civil Liberties Union Found. of Louisiana v. Bridges*, 334 F.3d 416 (5th Cir. 2003). For all of reasons set forth in the respondents' brief, that ruling is inconsistent with the text, history, and purpose of the Act.

The clear import of the caselaw developed by this Court and the lower federal courts over the last forty years, is that the TIA does not operate to bar actions when the requested relief would lead to an increase in state revenue.

B. The Interpretation of the TIA Advanced by Petitioner Would Dramatically Weaken Establishment Clause Protections

The petitioner's expansive view of the TIA would not only render many *past* decisions erroneous, it would bar the federal courthouse door to a broad range of civil rights cases in the future. This result would necessarily impair the vindication of Establishment Clause protections and frustrate the principal purpose of 42 U.S.C. § 1983.

---

[4] In *Ascension Lutheran Church v. Employment Sec. Comm'n of North Carolina*, 501 F. Supp. 843, 847-48 (D.N.C. 1980), the court found that a First Amendment challenge to statutes that required parochial schools to pay unemployment compensation tax was barred by the TIA. *Ascension*, however, involved a claim that would have decreased, rather than increased, state tax revenues and thus supports the interpretation of the TIA advanced by the respondents.

1. Disbursements of Public Funds Frequently Implicate Establishment Clause Concerns

Government funding of religious institutions has been of great concern to this Court over the last sixty years. Indeed, it is fair to say that this issue has dominated the Establishment Clause landscape ever since *Everson v. Board of Education*, 330 U.S. 1 (1947). *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenburger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Wolman v. Walker*, 433 U.S. 229 (1977); *Roemer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Hunt v. McNair*, 413 U.S. 734 (1973); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970); *Bd. of Educ. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968). As the Court has frequently observed, government "sponsorship [and] financial support" of religion were "[p]rimary among those evils" that the Establishment Clause was intended to guard against. *Nyquist*, 413 U.S. at 772; *cf. Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.") (emphasis omitted).

Many of the funding cases decided by the Court have involved state taxing schemes. *See, e.g., Mueller v. Allen*, 463 U.S. 388 (1983); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970). Yet, under the petitioner's conception of the TIA, the lower federal courts could no longer hear such cases. Indeed, a state legislature could go so far as to grant a tax credit limited to members of a particular faith and the lower federal courts would be powerless to enjoin it. This possibility is far from conjectural. *See Finlator v. Powers*, 902 F.2d 1158, 1159 (4th Cir. 1990) (considering the constitutionality of state tax statutes that specifically exempted the sale of Christian bibles from sales taxes but did not extend the exemption to the holy books of other religions, or any other book); *American Civil Liberties Union Found. of Louisiana v. Bridges*, 334 F.3d 416, 418 (5th Cir. 2003) (considering a similar scheme).[5]

The centrality of funding questions to Establishment Clause jurisprudence is unlikely to abate. Since the inception of "charitable choice" as a part of the 1996 Welfare Reform Act, *see* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S.C.), the provision of public funds to religious institutions has been accelerating at both the state and federal level. *See* Exec. Order

---

[5] Of course, the Establishment Clause would not be the only constitutional provision impacted by a broad interpretation of the TIA. Claims brought under other civil rights provisions would similarly be relegated to state court. For example, litigants would no longer be able to raise Free Exercise or Equal Protection challenges to facially discriminatory tax credits or facially neutral tax schemes that are applied in a discriminatory fashion. Tax schemes that distinguish between individuals on the basis of their gender, race, or residency status would also be immune from federal court challenge.

13199, 66 Fed. Reg. 8499 (Jan. 31, 2001) (establishing the White House Office of Faith-Based and Community Initiatives), *reprinted in* 5 U.S.C. § 601. These funding initiatives, which are often implemented through the provision of tax credits and deductions,[6] raise a host of novel questions. *See* Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 972-94 (2003). Under the petitioner's broad view of the TIA, the lower federal courts would be completely excluded from any role in defining the constitutional parameters of these programs.

2. Barring Federal Court Review Would Frustrate the Purposes of Section 1983

The animating principle of 42 U.S.C. § 1983 is that the availability of federal court review is central to the vindication of federal constitutional rights. *See Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (noting that Section 1983 was meant to "open[] the federal courts to private citizens" for violations of "rights secured by the Constitution and laws of the Nation"). Section 1983 was designed to create a parallel system of relief because state courts could not always be relied upon to properly enforce federal rights, whether "by reason of prejudice, passion, neglect, intolerance or otherwise." *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *see also Allen v. McCurry*, 449 U.S. 90, 98-99 (1980) ("[O]ne strong motive behind [Section 1983's] enactment was grave congressional

---

[6] *See, e.g.*, FLA STAT. ANN. § 220.187 (enacted 2001, expanded 2003); PA. STAT. ANN. Tit. 24, §§ 20-2001-B *et seq.* (enacted 2001); 35 ILL. COMP. STAT. ANN. 5/201(m) (enacted 1999); MINN. STAT. § 290.0674 (enacted 1999); IOWA CODE ANN. § 422.12(2) (expanded 1998).

concern that the state courts had been deficient in protecting federal rights."). As one legislator put it:

> The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily.

CONG. GLOBE, 42nd Cong., 1st Sess. 459-60 (1871), *cited in Mitchum*, 407 U.S. at 241 n.31.

It is uncontroversial that state judges, who do not have the benefit of life tenure and salary protection and who are often elected into office, face political pressures that federal judges do not — political pressures that tend to be at their greatest in Establishment Clause cases, which often evoke fierce sentiments on all sides. *See, e.g.*, *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir.), *cert. denied*, 124 S. Ct. 497 (2003); *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), *cert. granted sub nom., Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 384 (2003).[7]

---

[7] Some have even argued that federal judges may be, on average, more technically proficient than state court judges. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988). These authors point to the fact that federal judges receive higher salaries than their state counterparts, undergo a rigorous selection process, and typically have more proficient law clerks, smaller case loads, and expertise with federal issues. *See* Neuborne, *supra*, at 1122; Chemerinsky, *supra*, at 257-280.

Indeed, because of the highly inflammatory nature of Establishment Clause cases, some state court judges have gone so far as to campaign on a promise to impede Establishment Clause protections:

> Chief Justice Moore began his judicial career as a judge on the Circuit Court of Etowah County, Alabama. After taking office he hung a hand-carved, wooden plaque depicting the Ten Commandments behind the bench in his courtroom and routinely invited clergy to lead prayer at jury organizing sessions. Those actions generated two high-profile lawsuits in 1995 based on the Establishment Clause . . . . Both suits were dismissed on justiciability grounds. During his campaign for the Chief Justice position in the November 2000 election, then-Judge Moore's campaign committee, capitalizing on name recognition from the lawsuits, decided to refer to him as the "Ten Commandments Judge." . . . As a result, most of his campaign materials, including billboards, television and radio commercials, telephone scripts, and mailings, described him as the "Ten Commandments Judge" or otherwise referred to the Ten Commandments. The central platform of his campaign was a promise "to restore the moral foundation of law." After he was elected, Chief Justice Moore fulfilled his campaign promise by installing the Ten Commandments monument in the rotunda of the Alabama State Judicial Building.

Glassroth, 335 F.3d at 1284-85 (Carnes, J., for a unanimous panel) (citations omitted); *see also Glassroth v. Moore*, 229 F.

Supp. 2d 1290 (M.D. Ala. 2002) (noting the same history), *aff'd*, 335 F.3d 1282 (11th Cir.), *cert. denied*, 124 S. Ct. 497 (2003)). To entrust core Establishment Clause protections to state court judges, who lack the political insulation that Article III judges enjoy, would be to substantially curtail these protections and to betray the purpose of Section 1983.

3. The Potential for Supreme Court Review Is Not an Adequate Substitute for Lower Federal Court Review

To be sure, the petitioner's interpretation of the TIA would not completely bar the federal courthouse door; review could still be sought in this Court. This provides little comfort, however, as this Court is only able to review a small number of cases each year. *See* The Supreme Court of the United States, *The Justices' Caseload* (explaining that the Court issues formal opinions in eighty or ninety cases a year, and that an additional fifty or sixty are handled without plenary review), *available at* http://www.supremecourtus.gov/about/justicecaseload.pdf. This Court must by necessity leave untouched the vast majority of state court judgments. Given the discretionary nature of this Court's *certiorari* jurisdiction, *see* SUP. CT. R. 10, which is typically used "to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law," *Braxton v. United States*, 500 U.S. 344, 347 (1991), there would be no real possibility of federal review for many constitutional infractions.

Moreover, even if this Court could satisfactorily police all state court judgments, plaintiffs would be forced to exhaust the state court process prior to this Court's review, resulting in lengthy delays during which constitutional violations would persist without relief. For these reasons, discretionary review by this Court is inadequate to ensure vindication of the

Establishment Clause and other core constitutional protections.

II. The Respondents Do Not Seek a "Second Bite at the Apple"

The petitioner and its supporting *amici* repeatedly assert that allowing this litigation to proceed in federal court would allow those challenging the law "a second bite at the apple" because the Arizona Supreme Court previously addressed the constitutionality of ARIZ. REV. STAT. ANN. § 43-1089 in *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999). *See* Br. of the Hon. Trent Franks et al. (hereinafter "Franks Br.") at 6 ("Respondents seek another bite at the jurisprudential apple."); *accord* Pet. Br. at 3, 10 n.2, 29. But *Kotterman* decided a different question than the one raised here. The plaintiffs in *Kotterman* brought a facial challenge to the Arizona statute. Indeed, the complaint there was filed before the statute went into effect. The plaintiffs here are bringing an as-applied challenge that rests on implementation of the statute, a claim that *Kotterman* itself recognized would not be precluded.

Existing preclusion doctrines, such as the principles of res judicata, adequately preserve the finality of state court judgments. The defendants did not raise a res judicata defense in this case, *see Winn v. Killian*, 307 F.3d 1011, 1014 (9th Cir. 2002) ("Plaintiffs assert that principles of res judicata do not bar the instant action, and defendants have not raised a res judicata defense either here or in the district court."), and even if they had it would have been properly rejected, *see* J.A. at 15 (Compl. at ¶ 33) (noting that res judicata does not apply in this case because "neither Plaintiffs nor the Arizona Civil Liberties Union were parties to or controlled or directed the prior state court litigation"). Apparently recognizing that existing preclusion doctrines do not bar this suit, the petitioner seeks to

employ the TIA as an additional preclusion mechanism. This, however, is a function for which it was not designed.

A. The Claims in *Kotterman*

In *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999), a group of taxpayers brought a challenge to the constitutionality of the statute at issue in this case. In a 3-2 ruling, the Arizona Supreme Court upheld the statute on its face. It is beyond dispute that the issue in *Kotterman* was the facial validity of the statute, as the lawsuit was filed prior to the implementation of the program and, indeed, prior to the effective date of the statute. J.A. at 15 (Compl. at ¶ 33).

The Arizona Supreme Court itself recognized that it was considering a facial, rather than an as-applied, challenge. The plaintiffs in *Kotterman* had argued that because a large majority of private schools – the dissent put the figure at seventy-two percent, *see Kotterman*, 972 P.2d at 626 (Feldman, J., dissenting) – were religious in nature, there was no need to wait for the statute's implementation. The Arizona Supreme Court rejected the plaintiffs' argument that there was "an inevitable constitutional breach." *Kotterman*, 972 P.2d at 615. Instead, the court held that the statute on its face was consistent with *Mueller v. Allen*, 463 U.S. 388 (1983), while simultaneously acknowledging the possibility that subsequent developments could give rise to a constitutional problem once the statute was implemented:

> No one yet knows how many taxpayers will take the credit, what dollar amounts will be generated, or how many students will receive tuition scholarships, let alone their statistical distribution among schools. We also cannot

> predict how this tax credit may affect the ratio of secular to sectarian private institutions in the state.

Kotterman, 972 P.2d at 615-16. The Arizona Supreme Court's decision, therefore, is a paradigmatic case of a court rejecting a facial challenge to a statute but leaving open the possibility of a meritorious as-applied challenge in the future.[8]

B. The Claims in the Present Litigation

This case is precisely the one that the court in *Kotterman* anticipated: it raises an as-applied challenge to the statute's implementation. *See* J.A. at 8, 14 (Compl. at ¶ 3, ¶¶ 29-31). To substantiate the as-applied challenge, the complaint lays out a detailed account of how the program is operating in practice. J.A. at 8-14 (Compl. at ¶¶ 4-28); *cf. Winn v. Killian*, 307 F.3d 1011, 1014 (9th Cir. 2002) ("In their complaint, plaintiffs described how the STO tax scheme has worked in practice."). For example, the complaint explains that ninety-four percent of the funds go to STOs that give grants to students attending only religious schools. J.A. at 10 (Compl. at ¶ 15).

---

[8] *Kotterman* was not heard by the Arizona Supreme Court on appeal from an inferior court; it was instead taken by the court as a special action, as a matter of the court's original jurisdiction. *See Kotterman*, 972 P.2d at 610; *see also Randolph v. Groscost*, 989 P.2d 751, 753 (Ariz. 1999) (explaining that the Arizona Supreme Court "ha[s] original jurisdiction over mandamus, injunction, and other extraordinary writs to state officers and exercise that jurisdiction through the special action procedure"). The special action procedure is "highly discretionary," and is typically used only when several criteria are met, one being that the dispute "raises only issues of law" rather than fact. *See Randolph*, 989 P.2d at 753. Thus, the procedure by which the Arizona Supreme Court took the case further highlights the lack of the kind of lower court fact-finding that would accompany an as-applied challenge.

The complaint further asserts that parents who wish to send their children to secular schools may not be able to locate an STO willing to subsidize the tuition. *See* J.A. at 13 (Compl. at ¶¶ 25-26). These facts raise the possibility that the program does not entail "true private choice," a necessary prerequisite to holding the program constitutional. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

Whether or not these facts can be proven or, if proven, whether they would support a violation under *Zelman*'s criteria is of no present relevance given the procedural posture of this case; the only relevant point is that the respondents are seeking to show that the Arizona program is unconstitutional as it is currently operating, a claim that was not raised in *Kotterman*.

C. The "Second Bite at the Apple" Argument Is a Red Herring

Even if the plaintiffs were attempting a "second bite at the apple," this would hardly justify expanding the breadth of the TIA. Doctrines of res judicata – issue and claim preclusion – act to prevent relitigation not only of the "very same claim," but also of all "issue[s] of fact or law actually litigated and resolved in" the earlier litigation. *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001). Because 28 U.S.C. § 1738 makes state law principles of res judicata binding on federal courts, *see Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996), parties losing in state court cannot simply refile in federal court; nor can they attempt to "appeal" their state court losses in federal court, because of the *Rooker-Feldman* doctrine, *see Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). These doctrines adequately serve to protect the finality of state court judgments.

Petitioner and its *amici* suggest, without any foundation,

that these preclusion doctrines are insufficient and that the TIA should be broadened to complement them. *See* Pet. Br. at 3 (arguing that to permit this case to proceed would be to permit "duplicative federal court litigation" and that "[t]he history of the present dispute shows the extent of this unnecessary duplication"); *see also* Pet. Br. at 10 n.2, 29; Franks Br. at 6. Yet, the TIA was never intended for such a task and is hardly tailored for it: the TIA does not prevent *relitigation* specifically; it prevents litigation altogether. Thus, if petitioner's construction of the TIA were accepted, it would bar all litigation, irrespective of whether the state courts had previously ruled on a similar issue.

CONCLUSION

The sweeping interpretation of the TIA advanced by the petitioner is inconsistent with the longstanding jurisprudence of the federal courts, the history and purpose of Section 1983, and prudential considerations regarding the efficacy of state courts to decide controversial Establishment Clause cases challenging state action. The view that an expansive interpretation of the TIA is needed to prevent duplicative litigation is misguided, as current preclusion doctrines amply protect the finality of state court judgments.

Respectfully submitted,

AYESHA N. KHAN
*Counsel of Record
Americans United for
Separation of Church and State
518 C Street, NE
Washington, D.C. 20002

(202) 466-3234

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
People For the American Way
Foundation
2000 M Street, N.W.
Suite 400
Washington, DC 20036
(202) 467-4999

Dated: December 18, 2003